STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of G.R. NUNDLEY, Minor.

UNPUBLISHED
August 21, 2014

No. 315084
Wayne Circuit Court
Family Division
LC No. 10-497400-NA

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court order altering GN's (d/o/b September 13, 1996) permanency placement plan from reunification to another planned permanent living arrangement-emancipation (APPLA-E). GN turns 18 on September 18, 2014. We affirm in part, reverse in part.

I. FACTUAL BACKGROUND

Respondent's nine children came to petitioner's attention because marks were observed on 15-year old AN (AN1), and there was a history of physical abuse. A petition was filed to remove respondent's children. At the time of the hearing on the petition in 2010, respondent had placed the minor child at issue in this case, 15-year old GN, at Hawthorn Hospital Center, an intensive inpatient psychiatric service center. He was diagnosed with intermittent explosive disorder and post-traumatic stress disorder.

Respondent admitted that she was overwhelmed with all of the children in the home, but claimed that the bruising on AN1 could have been from respondent's attempt to restrain her, or AN1's fight with her brother. The petition subsequently was amended to state that "mother has extensive [Child Protective Services (CPS)] history" with various instances of a dirty house and improper supervision. The foster-care worker indicated that GN was not taking his medication or attending school.[1] A referee took temporary custody of the children.

[1] The children's father acknowledged that he had an extensive criminal history, cocaine usage, and that he was currently incarcerated for driving with a suspended license.

At the first dispositional review hearing on March 1, 2011, a foster-care specialist testified that the permanency plan was reunification. He testified that respondent mother had been participating in the treatment plan, had completed her parenting classes, and would receive therapy and education on proper discipline. The referee recommended that GN receive "psychological services, medication review, psychological evaluation, and school because he's been missing way too much school." The referee also ordered AN2 and EN returned to the home.

By the time of the permanency planning hearing on May 12, 2011, GN had been moved to Havenwyck Residential Treatment Center. Sarah Carleton, the Department of Human Services (DHS) Wrap-A-Round facilitator at the Guidance Center, had been working with respondent and her children for a year and testified that respondent was "very pro-active" in attending therapy. The referee indicated that the plan remained "to return ultimately the children to the home."

However, as of the next review hearing on August 29, 2011, the foster-care worker testified that GN was having problems at Havenwyck, as he was not speaking to his therapist, behaving aggressively, and getting into fights. GN refused to see respondent for visits. Carleton at Wrap-A-Round testified that respondent was "very compliant with all services," met with a parenting therapist, and completed individual therapy. The referee ordered all but AN1 and GN be returned to the home.

At the March 13, 2012 hearing, the foster-care worker stated that she "would like [GN's] permanent plan to be placement in another planned living arrangement with the likely goal of adult foster care." The foster-care worker also testified that GN had gotten into three fights with other residents within the past two weeks. The referee was concerned that something was "seriously wrong" as GN had not improved after being in a mental health facility for a year.

Another hearing was held two days later. The referee noted that although DHS showed the permanency plan as APPLA-E, it was inappropriate because GN was 15 years old, not 17 years old, as indicated in petitioner's records. Therefore, "APPLA-E was never an appropriate permanency plan for this child." The referee ordered GN to leave the mental health facility within 30 days, stating that it was "unconscionable to [her] how this child is in a mental health hospital with a diagnosis of Post-Traumatic Stress Disorder, and we have no improvement, no real plan, no progress." The referee identified the permanency plan as "return to mother" and "not APPLA-E" or residential care.

However, on June 9, 2012, while on a pass from Havenwyck, GN became upset, got in a physical altercation with his brother, and assaulted respondent. Although AN1 subsequently was returned to the home, GN was placed in a professional group home in Albion, Michigan. Petitioner asked that GN remain a temporary ward of the court. The referee directed that various placements be investigated and it approved "concurrent plans APPLA E and reunification because it's still not clear which is the most appropriate plan without the further guidance from the professionals."

GN returned to Havenwyck on November 29, 2012. He was uncooperative, and had to be carried into the building by the police. His therapist believed that such behavior, in part,

stemmed from "some trauma in the past that we're not aware of because he won't talk about it." At the review hearing on January 10, 2013, GN's therapist explained that while respondent tried to address GN's psychiatric needs before the case originated, when in the general community, GN refused to attend school or mental health treatment.

At the January 10, 2013 hearing—which was more than two years after the petition was filed—the referee finally changed the goal to APPLA-E only, stating that reunification was no longer viable. The referee acknowledged that respondent wanted to be a part of GN's life and would "have to just kind of do it on [her] own." The referee advised respondent that she had completed her service plan and there was nothing more for her to do.

Respondent filed for review of the referee, arguing that she "still wants to plan for [GN]" and "loves him and she wants to work with him and she eventually [would] like him to come home." She argued that APPLA-E was not in GN's best interests. The judge held that there was no error of law, and that the APPLA-E designation did not cut communications off completely between respondent and GN. Respondent now appeals.

II. PERMANENCY PLAN

A. STANDARD OF REVIEW

Appellate courts "review de novo the interpretation and application of statutes and court rules." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). We review a trial court's factual findings for clear error. *Id.* "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation marks, brackets, and citation omitted).

B. ANALYSIS

Respondent contends that the court erred in changing the permanency plan for GN to APPLA-E, as reunification should have remained the goal. We disagree.[2]

A permanency planning hearing is held so that the court may review the status of the child, and evaluate the progress made toward returning the child home or evaluating why the child should not be placed in the court's permanent custody. MCL 712A.19a(3); *In re Rood*, 483 Mich 73, 100; 763 NW2d 587(2009). In making this determination, the court "shall obtain the child's views regarding the permanency plan in a manner that is appropriate to the child's age." MCL 712A.19a(3). Ultimately, the trial court must determine whether:

> (1) the child may be returned to the parent, guardian, or legal custodian;
>
> (2) a petition to terminate parental rights should be filed;

[2] GN will be 18 years old on September 13, 2014. This is the age of majority in Michigan. See MCL 722.52(1).

(3) the child may be placed in a legal guardianship;

(4) the child may be permanently placed with a fit and willing relative; or

(5) the child may be placed in another planned permanent living arrangement, but only in those cases where the agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in subrules (1)-(4). [MCR 3.976(A).]

Furthermore, "[a]t the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2); MCL 712A.19a(5); *In re Rood*, 483 Mich at 100. The court must consider "any condition or circumstance of the child that may" implicate its finding, and respondent's failure to substantially comply with the case service plan is evidence the court may rely on in making that finding. MCR 3.976(E)(2); MCL 712A.19a(5); *In re Rood*, 483 Mich at 100. If the court decides not to return the child to his parent, and not to terminate parental rights, the court may:

(a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child,

(b) place the child with a fit and willing relative,

(c) upon a showing of compelling reasons, place the child in an alternative planned permanent living arrangement, or

(d) appoint a juvenile guardian for the child pursuant to MCL 712A.19a and MCR 3.979.

The court must articulate the factual basis for its determination in the court order adopting the permanency plan. [MCR 3.976(E)(4).[3]]

[3] Additionally, MCL 712A.19a(7) provides:

(a) If the court determines that other permanent placement is not possible, the child's placement in foster care shall continue for a limited period to be stated by the court.

(b) If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.

(c) Subject to subsection (9), if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated.

In this case, after more than two years of proceedings, the trial court concluded that GN should be placed in another planned permanent living arrangement (APPLA). In spite of the length of these proceedings, respondent contends that the trial court should have continued with the goal reunification. However, we agree with the lower court that DHS documented compelling reasons for the determination that reunification was not in the best interest of GN. MCR 3.976(A).

At the January 10th permanency planning hearing, GN's therapist at Havenwyck testified that GN had become more talkative and engaging when in therapy, which was a "drastic change from how it was before." She opined that many of the behavioral issues stemmed, at least in part, from "some trauma in the past that we're not aware of because he won't talk about it so that makes it difficult." She verified that "when he's out in the community, he refuses school and he refuses to do mental health treatment and that's the main concern." GN consistently stated that he did not want to return home. He would not listen to respondent and engaged in violent altercations when at home. In light of this compelling evidence, we find no error in the trial court's conclusion that GN's best interest would not be served through reunification. MCR 3.976(A)(5).

Moreover, there was significant evidence that returning GN to respondent's care "would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). GN was severely troubled, and often behaved violently. In fact, GN got into a violent altercation with his brother on a home visit in June 2012, and GN assaulted respondent. Furthermore, respondent's home was filled with significant triggers, as even respondent admitted to the foster-care worker that she went "back and forth" about having GN home because at times "she [didn't] think she can handle him."[4] As GN's therapist confirmed, GN probably suffered from some type of past trauma, presumably while in respondent's care. The therapist also voiced a significant concern that when GN was out in the community, he refused to go to school or attend mental health treatment. Thus, the evidence demonstrates that reunification and placement in respondent's home is not in GN's best interests.

Moreover, we find that the trial court's ruling was sufficiently supported by the record. MCR 3.976(E)(4). In its written order, the court noted that GN was 16 years old, and wanted to work toward independent living. See MCL 712A.19a(3) (the court "shall obtain the child's views regarding the permanency plan in a manner that is appropriate to the child's age.").[5] The court noted that it had tried reunification for about a year, but it was not working, and "it's the end of the road at this point." The referee clarified that respondent could continue to visit and be a part of GN's life. The referee also recognized that Havenwyck may not be the perfect environment for GN, and that an adult foster-care facility may be better suited to GN's needs. As the trial court confirmed, the permanency plan was calibrated to the circumstances of the case, and respondent was not cut out of the loop as she could continue her relationship with GN.

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[4] At the March 15th hearing, the therapist stated that GN reacted negatively to "chaos" around him.

[5] GN's therapist verified that he repeatedly stated he did not want to return home.

We also note that respondent's other children were returned to her and GN was not similarly situated as them, as he had significant unresolved mental and behavioral problems. While respondent's completion of her service plan and attempts to seek mental health services for GN are relevant, and certainly commendable, they cannot overcome the compelling evidence that GN's mental and physical health would be at substantial risk if returned to respondent's care, and it was not in his best interests. MCR 3.976(E)(2); MCL 712A.19a(5).[6]

III. RIGHT TO COUNSEL

However, we agree with respondent that, to the extent further hearings will be held that she will attend, she is entitled to counsel.

"A parent whose parental rights have not been terminated, including one who is not a named respondent, must be notified of and permitted to participate in each hearing, including dispositional review hearings, permanency planning hearings, and termination proceedings." *In re Rood*, 483 Mich at 94; MCL 712a.19(5)(c). Further, "the respondent has the right to a court appointed attorney at any hearing conducted pursuant to these rules, including the preliminary hearing, if the respondent is financially unable to retain an attorney[.]" MCR 3.915(B)(a)(i).[7]

Because the trial court declined to terminate respondent's rights, she remains the legal and natural parent of GN. Accordingly, we agree with respondent that she retains a right to counsel.

IV. CONCLUSION

We affirm the court's permanency plan, but to the extent that respondent attends further hearings, she has a right to representation. We affirm in part, reverse in part. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

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[6] To the extent that the guardian ad litem (GAL) now argues the trial court erred in not pursuing reunification, we note that at the January 10th hearing, the GAL stated: "So I think probably an APPLA E permanency plan would suit [GN] best . . . ." As we have held in the past, "a party may not successfully obtain appellate relief on the basis of a position contrary to that which the party advanced in the lower court." *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010).

[7] "Respondent" is defined as "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(10); MCR 3.977. The original petition under which the court asserted jurisdiction over GN included allegations that respondent committed an offense against her daughter.